Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
To: The Commission	)	

COMMENTS OF DIAL PAGE, INC.

Dial Page, Inc. ("Dial Page"), by its attorneys and pursuant to Commission Rule Section 1.415, submits its comments in response to the Commission's Second Further Notice of Proposed Rule Making in the above-captioned proceeding.[1/]

I. Introduction.

1. Dial Page is a Delaware corporation which itself and through various subsidiaries provides Public Land Mobile Service ("PLMS"), Private Carrier Paging Service ("PCP"), and Specialized Mobile Radio Service ("SMR") throughout the southern United States. Dial Page, through Dial Call, Inc. and related subsidiaries, has recently made a substantial investment in SMR service and has announced plans to establish an enhanced SMR system ("ESMR") throughout the southern United States. Dial Page expects this system to compete with the established cellular duopolies in the region as well as with providers of the recently authorized Personal Communications Service ("PCS") and other services based on developing technologies.

2. The Notice seeks comment on whether the Commission should attribute certain non-equity relationships for purposes of applying

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[1/] Second Further Notice of Proposed Rule Making, 9 FCC Rcd ___, FCC 94-191 (July 20, 1994) ("Notice").

the 40 MHz limitation on PCS spectrum, the PCS/cellular cross-ownership rule, or a more general Commercial Mobile Radio Service ("CMRS") spectrum cap. Notice at para. 4. Specifically, the Commission asks whether system management, resale and joint marketing agreements -- which do not confer control -- nevertheless so intertwine the parties involved as to adversely affect competition. Notice at para. 5. The Notice also seeks comments whether a more permissive approach is warranted for so-called designated entities. Notice at para. 11.

3. As shown below, the Commission should not consider non-equity interests for spectrum cap calculations of any sort. Indeed, as Dial Page has previously explained, an across-the-board CMRS spectrum cap is itself contrary to the public interest.[2/] Considering non-equity interests as part of any spectrum cap the

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[2/] See Dial Page's earlier Comments and Reply Comments in this proceeding, filed June 20, 1994 and July 11, 1994 respectively. As Dial Page pointed out in those submissions, in light of current limitations on the aggregation of CMRS spectrum, a general overall cap is neither necessary nor desirable. Imposition of a general spectrum cap is likely to inhibit investment in innovative services such as ESMR, thus stifling the creation of jobs in the CMRS industry. A general prophylactic provision, such as a spectrum cap, sweeps an unnecessarily broad brush to prevent a harm which the Commission's ongoing enforcement efforts are quite capable of countering in the unlikely event such harm should ever arise. Spectrum caps are further problematic in their design and application in light of the differing allocation methodologies among the various CMRS services. Moreover, the need to account for and consider the effect of the myriad of less than controlling minority positions in CMRS providers presents a still further complicating factor to applying a general spectrum cap in a rational manner. Given that antitrust concerns are not the primary concern of this agency, Dial Page concluded that a separate Commission rule and enforcement mechanism layered upon the existing antitrust laws is both unnecessary and a wasteful use of scarce government resources. Id.

Commission might mistakenly adopt would have little positive effect on competition and would instead limit flexibility of the industry to adapt to market conditions, while unduly taxing scarce Commission resources.

II. The Commission should decline to adopt any CMRS spectrum cap.

4. At the outset, Dial Page reaffirms its opposition to the adoption of any CMRS spectrum cap, irrespective of the particular attribution rules employed. Dial Page has previously described in detail the paucity of record evidence supporting such a cap. Virtually every segment of the CMRS industry opposed the idea of a cap on CMRS spectrum. Dial Page urges the Commission to consider carefully the virtually unanimous position of the CMRS industry on this matter of substantial significance. Should competitive abuses actually occur, that would be the appropriate time to take remedial action.

III. Non-equity interests should not be counted under any CMRS spectrum cap which may be adopted.

5. Despite the overwhelming case against imposition of a general CMRS spectrum cap, because the Commission might nevertheless be inclined to travel down this dangerous road, and because the Commission has already determined to adopt a PCS and PCS/cellular spectrum cap, Dial Page believes it important to explain why this agency should not consider non-equity relationships generally attributable.[3/] Management, resale and

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[3/] Dial Page also reiterates its recommendation that, should a CMRS spectrum cap be adopted, the attribution level should be increased from the proposed five to 40 percent, unless a party exercises actual control at some lower level. See Dial Page Reply Comments at 12, n. 10.

joint marketing agreements are unlikely to affect the incentive or ability of licensees to compete vigorously in the marketplace, nor are they likely to compromise the independence of pricing decisions by CMRS providers. To the extent licensees in any equity or non-equity relationship conspire or collude to set prices, the government is already empowered to bring to a halt such anti-competitive behavior under the Sherman Act. See 15 U.S.C. Sec. 1. Adopting a rule of general applicability, targeted to a few instances of potential abuse, itself has the potential to diminish innovation[4/] and competition, especially from designated entities and startup concerns.[5/]

6. The Notice acknowledges that the arrangements at issue here are permissible under the Commission's rules and policies. Notice at para. 5. By contrast, Section 310 of the Communications Act of 1934, as amended, prohibits any arrangement which confers

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4/ It is significant that the rise of the innovative ESMR industry has been fueled by the willingness of the Commission to grant liberal waivers of its rules. See Fleet Call, Inc., 6 FCC Rcd 1533 (1991); American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989). Heaping more restrictions on CMRS providers can only serve to inhibit innovative public service.

5/ Although Dial Page does not believe it is advisable for the Commission to institute a rule of general applicability with respect to attributing non-equity relationships, Dial Page does believe the Commission should recognize the possibility that such arrangements might, in a very few instances, facilitate dominant CMRS providers in a market in acting anticompetitively. For example, Dial Page could see a situation developing where the two existing cellular operators teamed together in a joint marketing agreement with the intent to squeeze out new entrants, such as PCS or ESMR operators. In such an instance, the Commission should be vigilant to protect competition. It should act not because such parties have entered into a non-equity arrangement, but because the parties are actually engaged in anticompetitive conduct.

control on a party without the prior authorization of the Commission.[6/] The Commission has identified a number of factors to be analyzed in determining whether a licensee has impermissibly relinquished control.[7/] Consistent Commission analyses have been developed for both the cellular and SMR industries.[8/] Thus, the arrangements here at issue fully comport with the Act because they do not transfer to a non-licensee improper control over policy, financial, or operational aspects of system management. For this same reason, such interests should not be considered attributable under any spectrum cap.

7. The Commission appears concerned, however, that such arrangements provide the manager with access to information which might be used to subvert competition, which might permit an intermingling of business interests to such a degree that consumer choices are diminished, or which might permit the use of front organizations to take advantage of designated entity opportunities. Notice at para. 6.

8. Although the Commission's concerns are legitimate fears, the mere possibility of harm which has not arisen despite years of positive experience with such arrangements, simply does not justify

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6/ See Notice at para. 5, n. 7.

7/ See Intermountain Microwave, 24 Rad. Reg. 983 (1963).

8/ See generally Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications," Report No. CL-93-141 (Sept. 22, 1993); Guidelines Concerning Operation of SMR Stations Under Management Contracts, 64 Rad. Reg. 2d (P&F) 840 (1988).

attributing for spectrum cap purposes a variety of non-controlling arrangements. Competition is enhanced when a variety of service providers make independent decisions regarding their marketing and pricing strategies. If the relationship between parties is such that the licensee is not able to exercise its independent judgement regarding such matters, then it is likely the Commission would find it had relinquished control of the system. By contrast, a licensee which remains in control would not be likely to maintain an arrangement in which its market sensitive information is used by another party to that party's advantage. The same is true of the potential "integration" of the businesses of multiple parties. Notice at para. 6. If the relationship is such that their activities become indistinguishable, then they most likely have exceeded the boundaries of permissible relationships. Thus, the key is whether control has passed as a result of such an arrangement. If it has, attribution for the purpose of a spectrum cap is perhaps the most minor sanction the Commission would be justified in imposing.

9. The years of experience of the CMRS industry teach that management agreements can increase the number of service providers in a marketplace rather than impede vigorous competition. That has been especially true in the SMR industry. The relative prevalence of management arrangements in that industry directly reflects the rules which govern it. The regulatory structure for this service was intended to maximize the number of competitive offerings in a market by assigning spectrum in small blocks and establishing

stringent construction and loading requirements to be satisfied prior to system expansion.

10. This regulatory environment enabled a large number of entities to participate in these industries. Some were large companies with substantial resources and expertise. Others were small operators who utilized management arrangements to supplement their own technical and marketing capabilities when necessary. In certain instances, licensees managed their own systems when they were geographically proximate, but entered into management relationships for facilities farther away. Some operators relied on management arrangements for their initial systems, but found them unnecessary for later-acquired facilities after they had developed sufficient expertise.

11. Thus, this business tool has facilitated the participation of a significant number of smaller entities in the private carrier industry to their benefit and the benefit of the public. This would not have occurred if the Commission had treated such arrangements as cognizable interests in multiple systems. Prospective system managers undoubtedly would have declined to provide these services if doing so restricted their ability to own and operate their own systems.

12. The same is likely to occur if system management, even when in full conformance with applicable Commission requirements, were to constitute an attributable interest for purposes of a CMRS spectrum cap. Those capable of providing management services would be deterred from doing so, and smaller parties, particularly designated entities and startup concerns, could encounter

substantial difficulty in fulfilling all functions needed to operate such systems.[9/] That result is clearly not intended by the Commission, and is not in the public interest.

IV. Commission review of management agreements would drain the Commission's limited resources.

13. Attributing non-equity interests under a spectrum cap would not only fail to promote vigorous competition, it would be a drain on scarce Commission resources. Management agreements come in all shapes and sizes, depending on the needs of the parties. Licensees and system managers develop agreements which meet their individual needs and circumstances. To the extent the Commission embarks on determining that a particular agreement does or does not constitute an attributable interest, the agency will become embroiled in an analysis of myriad contractual matters which it is ill-equipped to evaluate. This will be a time-consuming and burdensome task, with little or no corresponding public interest benefit.

V. No need exists to attribute resale and joint marketing agreements.

14. Dial Page concurs with the Commission's tentative determination that resale agreements do not raise competitive issues comparable to those the agency associates with management

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9/ This fact should not serve as a basis for excepting designated entities from attribution of the arrangements at issue here. If the purpose of an attribution rule is to prevent collusion and promote competition, there is no basis to hold that attribution is warranted, except in the case of designated entities. If anything, such a rule would likely promote sham arrangements in the name of designated entities. Instead, the Commission should employ a rational, consistent policy among its licensees, which in this case would be not to attribute such arrangements for the purpose of spectrum caps.

agreements. Notice at 13. Resale increases competition without allowing any substantial danger that pricing or other policies are likely to be shared and without any danger of unauthorized transfer of control. Thus, attribution is not warranted.

15. Joint marketing agreements similarly should not be considered attributable. The Commission has already recognized that the economic advantages of such arrangements may be beneficial to both licensees and subscribers. Notice at para. 14. The Commission's concern that such relationships could discourage robust competition is unfounded for the same reasons discussed with respect to management agreements. The benefits likely to result from these arrangements clearly outweigh any potential anti-competitive concerns. Thus, joint marketing agreements should also be excluded from any CMRS spectrum caps the Commission might be tempted to adopt.

VI. Conclusion.

16. Dial Page urges the Commission to refrain from adopting any general spectrum cap and to decline to attribute non-equity relationships for the purpose of any spectrum cap the agency enforces. Attributing non-equity interests as part of any spectrum cap the Commission might mistakenly adopt would have little positive effect on competition, would limit the industry's flexibility to adapt and innovate, and would unduly tax scarce Commission resources. To the extent specific competitive abuses occur, the Commission, the courts and other agencies are well equipped to remedy such abuses without the need for overly restrictive rules concerning relationships between CMRS providers.

Accordingly, Dial Page urges the Commission not to attribute such relationships under any spectrum cap regulation.

Respectfully submitted,

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